IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3029 OF 2004

The Board of Trustees of the Port of Mumbai, a body corporate constituted under the provisions of the Major Port Trusts (Amendment) Act, 1974, having its principal place of business at 'Vijay Deep', Shoorji Vallabhdas Marg, Mumbai 400 038. ...Petitioner

V/s.

1. Deepak Sakharam Raut, residing at & Post Malgud, District Ratnagiri, Maharashtra.

2. S.C. Pandey, Presiding Officer, Central Government Industrial Tribunal Labour Court No.1, Shram Raksha Bhavan, Shivsrushti Road, Opposite Priyadarshini, Eastern Express Highway, Sion, Mumbai 400 022. ...Respondents

Shri P. Ramaswamy alongwith Mr.N.H. Munjee instructed by M/s.Mulla & Mulla & Craigie Blunt & Caroe for the Petitioner.

Shri Jaiprakash Sawant for Respondent No.1.

CORAM : V.M. KANADE, J.

DATED : MARCH 16, 2007

ORAL JUDGMENT :-

1. By this petition, the petitioner - Bombay Port Trust is challenging the Award passed by the Central

Government Industrial Tribunal No.1 in Reference CGIT-53/98 dated 21.8.2003 whereby the Tribunal directed the petitioner- Port Trust to reinstate the respondent as Assistant Welder w.e.from 1.5.87 with continuity in service but without payment of backwages. The Tribunal also further directed the petitioner - Port Trust to grant the respondent's seniority from the date of his termination i.e. from 1.5.87. The Tribunal further directed that if the respondent was entitled to further promotion on the basis of his seniority, the Port Trust should consider him by promoting him to the next higher cadre as if he was working as a Assistant Welder from the date on which he was found due for promotion.

2. Brief facts which are relevant for the purpose of deciding this petition are as under :-

. Sometime in 1984, the Recruitment Committee of the petitioner empanelled candidates for the post of Welders and Assistant Welders and respondent no.1 was placed at Serial No.6 as Assistant Welder. During the period from 1986-87, temporary appointments were made

according to the petitioner for the post of Welders and Assistant Welders in connection with temporary project of major repairs to Hughes Dry Dock, Caisson Dock and also Inner Lock Gate of the said Dock. The first respondent was initially appointed for a period of four and half years i.e. from 13.2.86 till 31.5.86 and he was discontinued and was given a break after 31st May, 1986. Thereafter, he was again reappointed on 30.9.86 to 31.12.86 and after 31.12.86, he ceased to work with the petitioner. Thereafter, again he was given employment for a fixed period from 5.1.87 to 30.4.87 and after the end of this period, he was not employed again by the petitioner.

3. It is the case of the petitioner that since the work was of temporary nature, after the project of repairs in dock area was over, every effort was made by the petitioner to absorb these temporary employees and that those who were working as Welders were absorbed in the post of Assistant Welders and those who were working as Assistant Welders were given the option to choose alternate jobs which were offered. The first respondent

was offered the job of "Mazdoor", however, he failed in the test and therefore, was not qualified to worked as "Mazdoor".

4. After a lapse of almost 7 years, a petition was filed by the petitioner in this Court and the Government of India was directed to refer the dispute to adjudication. Accordingly, on 10.12.98 almost after a lapse of eleven and half years, the Government of India in exercise of its powers under Section 10 of the Industrial Disputes Act, referred the dispute to adjudication.

5. On 29.1.99, a Statement of claim was filed by the first respondent in which he alleged that he was employed by the Mumbai Port Trust as Welder with effect from 13.2.86 and his services were illegally terminated and therefore, he was entitled to reinstatement with backwages. A written statement was filed by the petitioner in which it was specifically contended that the 1st respondent was employed for a particular project job purely on a temporary basis and his services

were terminated on the completion of the project. The first respondent filed his affidavit in support of the claim and on behalf of the petitioner-Bombay Port Trust, affidavit of Shri R.N. Mohadikar was filed. On the basis of this material on record, the Tribunal was pleased to allow the reference with a direction to reinstate the petitioner.

6. The learned Counsel for the petitioner submitted that the Tribunal had not taken into consideration the provisions of Section 2(oo)(bb) of the Industrial Disputes Act and had not taken into consideration the evidence which was brought on record and therefore, the finding which was recorded by the Tribunal was perverse. He submitted that in the documents which were brought on record by the respondent no.1 itself clearly indicated that the respondent no.1 was appointed for a fixed period for a particular project and after the project was over, he was discontinued. He submitted that therefore, the respondent no.1 did not have any legal right to continue in the said post and therefore, there was no retrenchment as alleged by the first respondent

but it was termination after the project work was over and therefore, the provisions of Section 2(oo)(bb) were clearly attracted. In support of the said submission, he relied on the judgment of the Supreme Court in the case of **D.G.M. Oil and Natural Gas Corpn.Ltd. and another, Appellants v. Illias Abduylrehman, Respondent (AIR 2005 SC 660).** He further submitted that the evidence on record clearly indicated that respondent no.1 had been appointed for a particular purpose. He submitted that the burden of proving that the respondent was appointed on a permanent post was on the respondent himself and in the absence of any material being produced, no finding could have been recorded by the trial Court. He also relied on number of judgments which have been taken into consideration by the appropriate courts.

7. Shri Sawant, learned Counsel appearing for the first respondent submitted that the provisions of Section 25B were clearly attracted in the aforesaid case and that the respondent having completed 240 days in one year could not have been terminated without following

the mandatory provisions of Section 25F of the Industrial Disputes Act. He submitted that the petitioner for the first time in the High Court had submitted that provision of Section 25(oo)(bb) were applicable to the facts of the present case. He submitted that this issue was not framed by the Industrial Court. He submitted that the workman was employed by the petitioner management of Mumbai Port Trust in the capacity of Assistant Welder after following the prescribed recruitment procedure. He submitted that respondent no.1 was sponsored by the Employment Exchange Office in response to notification issued by the petitioner for filling up the post of Assistant Welder etc. in its establishment. He submitted that respondent no.1 was never informed that he was appointed for a specific project work.

8. He further submitted that on 5.1.87, the Chief Mechanical Engineer had by his order dated 5.1.87 had given sanction to absorb workmen including the respondent no.1 in the post of Assistant Welders permanently in a particular order of merit and the

petitioner was shown at Serial No.3. He submitted that this document was admitted by Shri Mohadikar, employee of Bombay Port Trust and the document Exhibit W-2 was on record of the Tribunal.

9. He submitted that on 1.5.87, the services of the respondent no.1 were terminated with effect from 1.5.87 without following the principles of natural justice and without following the provisions of the Industrial Disputes Act, 1947 and though he was shown at Serial No.3 on merit list, the candidates who were junior to him and shown at Serial Nos.4 and 6 in the said list, were retained and continued in service but the petitioner was terminated with effect from 1.5.87 and even thereafter, several vacancies had arisen in the said post and other persons were appointed, however, the petitioner was not absorbed. He submitted that therefore, the termination of respondent no.1 was clearly a retrenchment within the definition of Section 2(oo) of the said Act and the mandatory provisions of Section 25F were not complied, the termination was ab initio void.

10. He further submitted that apart from breach of Section 25F, it was alleged that the petitioner had violated the provisions of Section 25G and 25H of the Act read with Rules 77 and 78 since the persons who are junior to the first respondent were retained and it was the duty of the petitioner to have offered the said post to the first respondent and this not having been done, the order of termination was liable to be set aside. In support of the said submission, he relied on the judgment of the Supreme Court in the case of **Shankar Chakravarti, Appellant v. Britannia Biscuit Co.Ltd and another, Respondents (AIR 1979 SC 1652)** and more particularly, para 31 of the said judgment. He also relied on the judgment of this Court in the case of **Shri Aloysius Nunes Vs. M/s. Thomas Cook India Ltd. (2000(3) ALL MR 433)** in which it was held that if no pleadings were made before the Tribunal, then in such a case, the matter cannot be allowed to be argued for the first time in writ petition. He also relied on the judgment of the Supreme Court in the case of **S.M. Nilajkar & Ors. Vs. Telecom, District Manager,**

Karnataka (2003 II CLR 233). He then relied on the judgment of the Supreme Court in the case of **Central Bank of India Vs. S. Satyam & Ors. (1996 II CLR 1095).** He also relied on the judgment of this Court in the case of **N.L. Mehta Cinema Ent.P.Ltd. Vs. Vijay G. Shivgan & Others (1988 I CLR Page 416)** and finally relied on the judgment of this Court in the case of **M.S.E.B. Workers Federation, Pune Vs. Maharashtra State Electricity Board and Ors. (1995 II CLR 588)**.

11. After having given my anxious consideration to the submissions made by the learned Counsel for the petitioner and the learned Counsel for the respondent, I am of the view that the submissions made by the learned Counsel for the petitioner will have to be accepted. So far as the facts are concerned, it is not disputed that the first respondent worked during the period of 1986 and 1987 for a fixed period. He initially worked from 13.2.86 to 31.5.86. Thereafter, he again worked after a gap of three months from 30.9.86 to 31.12.86 and then after a break of five days, he worked from 5.1.87 to 30.4.87. The respondent no.1 did not produce any

document of letter of appointment, however, he choose to rely on the document which was produced by the petitioner’s witness. The first respondent relied on the letter dated 5.1.87. The subject of the letter states as under :-

> "Sub. : Filling in of Group posts of Asstt. Welder, Boiler Shop, B.P.T.Workshops in connection with Major repairs in Inner Lock Gate, Indira Dock, T.R.No.271 dated 14.10.1986."

Below the subject, it is stated that the first respondent and some other candidates were proposed for recruitment. The same letter also mentions that three candidates, viz. P.E. Mokal, V.G. Jadhav and G.R. Tendlekar from the panel of Welders had given an undertaking that they were prepared to work as Assistant Welders for the said job. The letter also indicates that the appointment of the said six candidates was made as temporary Assistant Welders in connection with the above work. The letter, therefore, on which reliance has been placed by the first respondent itself indicates

that he was appointed for a particular project repair work and certain candidates who were already in the panel of Welders were also mentioned as Assistant Welders for the said job. Apart from this document and the document inviting the respondent for medical examination, there is no other other material on record to indicate that the respondent was to be appointed on a permanent basis or on a temporary basis for a permanent job.

12. The first question which falls for consideration is whether the termination of the first respondent amounts to retrenchment under Section 2(oo) and consequently, whether it was essential for the petitioner-Bomaby Port Trust to comply with the mandatory provisions of Section 25F and 25G and 25H. The second question is whether the first respondent's termination was covered under the exception provided in Section 2(oo)(bb) and lastly, whether the petitioner was permitted to raise the issue that the case of the respondent no.1 was clearly covered by the provisions of Section 2(bb) for the first time in this Court.

13. In the present case, since the admitted position from the facts which are considered hereinabove is that the respondent worked for fixed periods after he was given breaks in his employment, it cannot be said that the petitioner was entitled to get the benefit of the provisions of Section 25F and 25G and 25H. It is an admitted position that the first respondent was given a break in service. There is no material on record to indicate that he was appointed not for a fixed period or for a specific purpose or project. Record on the contrary which is brought on record by the first respondent himself does indicate that he was employed for doing a project work for a fixed period and after completion of the said work, he was not employed again. That being the position, the contention of the first respondent that he was working for a period of 240 days and was therefore, entitled to get the protection of provisions of Section 25F cannot be accepted. The Apex Court in the case of **D.G.M. Oil and Natural Gas Corpn.Ltd. (supra)** has considered this aspect and has held that number of days of work put in by a workman in

broken periods cannot be taken as continuous employment for the purpose of Section 25F. The Apex Court in para 8 has observed as under :-

> "A perusal of the evidence adduced by the workman himself shows that he went in search of employment to different places and whenever there was a temporary employment available in different Departments of the appellant-Corporation; be it the field work or the work in the Chemistry Department, he accepted the employment and worked in these Departments not in one place alone but at different places like Baroda and Mehsana. It has come on record that the Management did try to accommodate the appellant in a permanent job but could not do so because of lack of qualification. In such circumstances we think the Industrial Tribunal was justified in coming to the conclusion that the number of days of work put in by the respondent in broken periods, cannot be taken as a continuous employment for

> the purpose of section 25F of the Act, as has been held by this Court in the case of Indian Cable Co. Ltd. (supra). We are aware that the judgment of this Court in Indian Cable Co. Ltd. (supra) was rendered in the context of section 25G of the Act, still we are of the opinion that the law for the purpose of counting the days of work in different Departments controlled by an apex Corporation will be governed by the principles laid down in the judgment of Indian Cable Co. Ltd. (supra), and the Industrial Tribunal was justified in dismissing the Reference."

14. In my view, the ratio of this judgment squarely applies to the facts of the present case. The respondent no.1 also was appointed for a fixed period and was given breaks from time to time. In view thereof, it cannot be said that he had worked continuously for a period of 240 days and therefore, the benefit of Section 25F cannot be given to him.

15. Further Section 2(oo)(bb) carves out an exception to the general rule which is laid down in Section 2(oo). It would be relevant reproduce the said provision. Section 2(oo)(bb) read as under :-

> "termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or."

16. A perusal of the aforesaid provision clearly discloses that the case of the respondent no.1 is squarely covered by the said provision and therefore, this case falls within the exception to the general rule of Section 2(oo) which stipulates that the word "retrenchment" includes the termination by a employer of a service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of a disciplinary action. Further, even assuming that the services of the first respondent were availed through

the employment exchange, that by itself would not indicate that he was appointed on a temporary basis for a permanent job. The case of respondent no.1 therefore falls within the exception as laid down in Section 2(oo)(bb). Therefore, I am of the view that the provisions of Section 25F of the said Act will not be applicable to the facts of the case, for the same reason provisions of Section 25G and 25H also are not attracted and therefore, the question of giving benefit of the said provisions to the first respondent does not arise.

17. So far as the argument advanced by Shri Sawant, learned Counsel appearing on behalf of the respondent that the provisions of Section 2(oo)(bb) were not specifically pleaded or raised before the Tribunal and that the argument was sought to be advanced for the first time in the writ petition is concerned, this submission also cannot be accepted. It is a well settled position in law that whenever pleadings are made, it is not always necessary to quote the provisions of the relevant section if the pleadings are in consonance with the text of the provision, then in that

case it has to be held that such a plea was in fact raised in the written statement. A perusal of written statement in this case clearly indicates that this plea was specifically raised by the petitioner before the Tribunal. Merely because an issue has not been framed by the Tribunal, that need not be a ground to preclude the petitioner from raising this argument in a writ petition. This submission, therefore, also cannot be accepted. The ratio of the judgment on which reliance has been placed by the learned Counsel for the respondent no.1, therefore, will not be applicable to the facts of the present case.

18. The Tribunal, in my view, has recorded the finding in favour of the respondent on conjectures and surmises and that the evidence on record does not support the findings which are arrived at by the Tribunal. The Tribunal on one hand relied upon the evidence of Shri R.N. Mohadikar wherein in the case, it is stated that workman was working in the workshop of MBPT. The Tribunal, however, very surprisingly completely overlooked the further evidence of this

witness in cross-examination wherein he has stated that the workman was posted at inner Lock gate for some time. In the same breath, the Tribunal further discards the other evidence of this witness by saying that this witness does not inspire any confidence. The manner in which, therefore, the evidence on record has been appreciated by the Tribunal to say the least is unacceptable.

19. The entire edifice which is erected by the learned Tribunal is based on a foundation which is in my view, non-existent. The conclusion, therefore, which has been arrived at by the Tribunal is clearly illegal and cannot be sustained.

20. The impugned order, therefore, will have to be set aside.

21. There is another angle to this case which needs to be stated. The workman, in question, worked for the three consequential periods in the year 1986 and 1987. He made an application to the Government for making a

reference after a lapse of seven years. The Government of India made a reference under Section 10 to the Tribunal after a lapse of ten years. By the time, the matter was taken up to the Tribunal, more than 17 years had elapsed. This is a another factor, in my view, which has to be kept in mind as in the affidavit-in-reply, there is no indication what the respondent had been doing during all these periods. Taking into consideration all these peculiar facts and circumstances of the case, in my view, the petition has to be allowed. Rule is made absolute in terms of prayer clause (a).

22. However, it is noted that after the Award was passed in favour of the petitioner in 2004 pursuant to the provision of Section 17B, he has been receiving wages for the last two and half years to the tune of Rs.1500/- per month. In my view, in view of the peculiar facts and circumstances of the case, the petitioner company will not be entitled to recover the wages already paid to the respondent.

23. Rule, therefore, is made absolute in the above terms.

(V.M. KANADE, J.)